

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

O.Z. MARTIN,

Plaintiff,

No. CIV S 04-2360 MCE CMK P

vs.

JAMES TILTON¹, et al.,

ORDER VACATING SCHEDULING ORDER,
DENYING THE PLAINTIFF'S MOTION TO
COMPEL, AND ORDER DIRECTING SERVICE
BY THE UNITED STATES MARSHAL
WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding without counsel and in forma pauperis in this civil rights action. Plaintiff alleges that his rights under the Americans with Disabilities Act and under the Eighth Amendment were violated when defendants refused to provide him with a double mattress. Currently pending is plaintiff's motion to compel discovery and for sanctions.

In his motion to compel sanctions, plaintiff sought information concerning the duties of Captain J. Stocker. In defendants' response they correctly noted that defendant Stocker had not been served. Plaintiff responded by noting that, by order filed January 4, 2005, the court

¹Pursuant to Fed. R. Civ. P 25(d), James Tilton is substituted for his predecessor.

1 had granted his motion to file an amended complaint. By order filed January 6, 2005 the court
2 found that the amended complaint stated a cognizable claim against defendants Almeida, Carey
3 and Stocker; thereby making the amended complaint filed December 20, 2004 the operative
4 complaint in this matter. The January 6, 2005 order directed plaintiff to provide information for
5 service of process on form USM-285, a completed summons, sufficient copies of the amended
6 complaint for service, and a notice of compliance. Plaintiff filed the required papers. (Doc. 15.)

7 Around the time that the court granted plaintiff's leave to amend, plaintiff filed
8 several motions for relief (docs. 7, 8, 12), and the court switched from its old method of filing to
9 electronic filing. It appears that the documents which plaintiff submitted for service of his
10 amended complaint were lost in the confusion and the amended complaint was never served.
11 This action has not been proceeding on the operative complaint. Accordingly, the court will
12 vacate the scheduling order in this matter and order the amended complaint served on defendants.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. The Clerk of the Court is directed to forward the instructions for service of
15 process, the completed summons, copies of the amended complaint filed December 20, 2004 and
16 copies of this order to the United States Marshal.

17 2. Within ten days from the date of this order, the United States Marshal is
18 directed to notify defendants James Tilton², Jr. Tom L. Carey and J. Stocker of the
19 commencement of this action and to request a waiver of service of summons in accordance with
20 the provisions of Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c). Plaintiff's complaint lists four Doe
21 defendants. The court cannot order service of process upon fictitious defendants. Upon
22 discovering the name of any of the Doe defendants, plaintiff must promptly file a motion for leave
23 to amend, accompanied by a proposed amended complaint identifying the additional defendant or
24 defendants. Plaintiff is warned that undue delay in discovering the defendants' names and

25 ²As previously noted, Pursuant to Fed. R. Civ. P 25(d), James Tilton is substituted for his
26 predecessor Edward Almeida, Jr. (who was then replaced by Jeanne Woodford).

1 seeking leave to amend may result in the denial of leave to proceed against these defendants.

2 3. The United States Marshal is directed to retain the sealed summons and a copy
3 of the amended complaint in their file for future use.

4 4. The United States Marshal shall file returned waivers of service of summons as
5 well as any requests for waivers that are returned as undelivered as soon as they are received.

6 5. If a waiver of service of summons is not returned by a defendant within **twenty**
7 days from the date of mailing the request for waiver, the United States Marshal shall:

8 a. Personally serve process and a copy of this order upon the defendant
9 pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C.
10 § 566(c) and shall command all necessary assistance from the California
11 Department of Corrections (CDC) to execute this order. The United States
12 Marshal shall maintain the confidentiality of all information provided by
13 the CDC pursuant to this order.

14 b. Within ten days after personal service is effected, the United States
15 Marshal shall file the return of service for the defendant, along with
16 evidence of any attempts to secure a waiver of service of summons and of
17 the costs subsequently incurred in effecting service on said defendant. Said
18 costs shall be enumerated on the USM-285 form and shall include the costs
19 incurred by the Marshal's office for photocopying additional copies of the
20 summons and amended complaint and for preparing new USM-285 forms,
21 if required. Costs of service will be taxed against the personally served
22 defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

23 6. Defendants shall reply to the amended complaint within the time provided by
24 the applicable provisions of Fed. R. Civ. P. 12(a).

25 7. Discovery shall not proceed until the court issues a discovery order. Generally,
26 a discovery order will issue after defendants file their answer.

1 8. Unless otherwise ordered, all motions to dismiss, motions for summary
2 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59
3 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 11-110 shall
4 be briefed pursuant to Local Rule 78-230(m). Failure to oppose such a motion timely may be
5 deemed a waiver of opposition to the motion. Opposition to all other motions need be filed only
6 as directed by the court.

7 9. If plaintiff is released from prison at any time during the pendency of this case,
8 any party may request application of other provisions of Local Rule 78-230 in lieu of Local Rule
9 78-230(m). In the absence of a court order granting such a request, the provisions of Local Rule
10 78-230(m) will govern all motions described in #7 above regardless of plaintiff's custodial status.
11 See Local Rule 1-102(d).

12 10. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),
13 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to
14 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of the
15 Federal Rules of Civil Procedure. Such a motion is a request for dismissal of unexhausted claims
16 without prejudice. The defendant may submit affidavits or declarations under penalty of perjury
17 and admissible documentation to support the motion to dismiss. To oppose the motion, plaintiff
18 may likewise file declarations under penalty of perjury and admissible documentation. Plaintiff
19 may rely upon statements made under the penalty of perjury in the complaint if the complaint
20 shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's
21 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one
22 or more affidavits or declarations by other persons who have personal knowledge of relevant
23 matters. Plaintiff may also rely upon written records, but plaintiff must prove that the records are
24 what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence with admissible
25 evidence, the court may rely on the defendant's evidence. In the event both sides submit matters
26 outside the pleadings, the court may look beyond the pleadings and decide disputed issues of fact.

1 If plaintiff does not serve and file a written opposition to the motion, the court may consider the
2 failure to act as a waiver of opposition to the defendant's motion. If the defendant's motion to
3 dismiss, whether opposed or unopposed, is granted, plaintiff's unexhausted claims will be
4 dismissed without prejudice.

5 11. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),
6 cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),
7 plaintiff is advised of the following requirements for opposing a motion for summary judgment
8 made by defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure. Such a motion
9 is a request for an order for judgment in favor of defendants without trial. A defendant's motion
10 for summary judgment will set forth the facts that the defendants contend are not reasonably
11 subject to dispute and that entitle the defendants to judgment. To oppose a motion for summary
12 judgment, plaintiff must show proof of his or her claims. Plaintiff may do this in one or more of
13 the following ways. Plaintiff may rely upon statements made under the penalty of perjury in the
14 complaint if the complaint shows that plaintiff has personal knowledge of the matters stated and
15 plaintiff calls to the court's attention those parts of the complaint upon which plaintiff relies.
16 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that
17 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must
18 have personal knowledge of the facts stated. Plaintiff may rely upon written records, but plaintiff
19 must prove that the records are what plaintiff claims they are. Plaintiff may rely upon all or any
20 part of the transcript of one or more depositions, answers to interrogatories, or admissions
21 obtained in this proceeding. If plaintiff fails to contradict the defendants' evidence with
22 counteraffidavits or other admissible evidence, the defendants' evidence may be taken as the truth
23 and the defendants' motion for summary judgment granted. If there is some good reason why
24 such facts are not available to plaintiff when required to oppose a motion for summary judgment,
25 the court will consider a request to postpone considering the defendants' motion. If plaintiff does
26 not serve and file a written opposition to the motion or a request to postpone consideration of the

1 motion, the court may consider the failure to act as a waiver of opposition to the defendants'
2 motion. If the defendants' motion for summary judgment, whether opposed or unopposed, is
3 granted, judgment will be entered for the defendants without a trial and the case will be closed.

4 12. A motion or opposition supported by unsigned affidavits or declarations will
5 be stricken.

6 13. Each party shall keep the court informed of a current address at all times while
7 the action is pending. Any change of address must be reported promptly to the court in a separate
8 document captioned for this case and entitled "Notice of Change of Address." A notice of change
9 of address must be properly served on other parties. Pursuant to Local Rule 83-182(d), service of
10 documents at the record address of a party is fully effective. Failure to inform the court of a
11 change of address may result in the imposition of sanctions including dismissal of the action.

12 14. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of
13 Court.

14 15. The failure of any party to comply with this order, the Federal Rules of Civil
15 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but
16 not limited to, dismissal of the action or entry of default.

17 16. The scheduling order issued on May 26, 2006 (doc. 27) is vacated.

18 17. Plaintiff's motion to compel (doc. 32) is denied as moot.

19 DATED: October 31, 2006.
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22 **CRAIG M. KELLISON**
23 UNITED STATES MAGISTRATE JUDGE
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